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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits	)	MM Docket No. 92-264

OPPOSITION TO PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Rules, 47 C.F.R. § 1.429, Center for Media Education and Consumer Federation of America ("CMA/CFA") by their counsel, Institute for Public Representation and Media Access Project, oppose Bell Atlantic's Petition for Reconsideration filed in the above referenced proceeding. Petitions for Reconsideration of Actions in Rulemaking, 59 Fed. Reg. 3859 (Jan. 27, 1994).[1]

In its Second Report and Order the Commission decided to apply ownership limits to cable systems that face local competition as well as those that do not. Implementation of Sections 11 and 13 of the Cable Television Consumer protection and Competition Act of 1992, Second Report and Order, FCC 93-456 (rel. Oct. 22, 1993), summarized at 58 Fed. Reg. 60135 (Nov. 15, 1993)("2nd R&O"). The Commission reasoned that the presence of

[1] This opposition is timely filed because the FCC was closed on February 11, 1994, due to snow and ice conditions.

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local competition does not respond directly to Congress's concern that large, vertically integrated companies exercise inordinate power in the national programs acquisitions market. 2nd R&O ¶ 29. The Commission also decided to postpone further consideration of whether or when the limits should be phased out until after it has had time to observe the practical effect of the rules. 2nd R&O ¶ 89. CME/CFA support the Commission's decision to apply the ownership limits to cable systems facing competition, and oppose Bell Atlantic's petition for reconsideration.

The fundamental perception driving the 1992 Cable Act was that the mere theoretical availability of competition had proven inadequate to foster actual competition. For that reason, Congress enacted sections 19, 11, and 13, among others. Bell Atlantic is essentially asking the Commission to reinstate the flawed premise of the 1984 Act--that theoretical competition is as good as the real thing. This the Commission should decline to do.

Bell Atlantic claims the ownership limits will inhibit entrance by potential competitors into the video delivery market. Bell Atlantic Petition for Limited Reconsideration, MM Docket No. 92-264 at 3, 5 (Dec. 15, 1993)("BA Pet."). Their argument rests, however, on unsupported speculation about the future of the industry; speculation which gives the Commission no reason to drop the limits at this time. For example, it would be premature to adopt Bell Atlantic's position that the possibility of competition from video dialtone tomorrow makes vertical limits unnecessary today. Similarly, Bell Atlantic's suggestion that subscriber limits might someday discourage entry is hardly a reason for changing the rules now.

Bell Atlantic also claims the cable operators' market power depends upon their bottleneck local monopolies. BA Pet. at 5. This argument ignores Congress's well-founded concern that multiple systems operators ("MSOs") exert control at the national level by dint of sheer size. In situations where Congress believed local competition solves the problem of cable market power, it wrote that belief into the law.[2] The Commission knows that Congress did not call for lifting the ownership limits if competition developed, as it did when it dealt with rates. This argues that Congress intended the limits to apply in competitive as well as in monopoly markets.

Finally, analogous ownership limits govern broadcasters despite vigorous competition from many local stations. We therefore see no reason for making local competition a basis for dropping the limits on MSOs. For all the above reasons, CME/CFA

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[2] For example, in Section 3 of the 1992 Cable Act, Congress directed the Commission not to impose rate regulation where effective competition exists: "If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section." 47 U.S.C. § 543(a)(2). (emphasis supplied).

Bell Atlantic asserts that "the same underlying principles also apply [to ownership limits]. BA Pet. at 2. That Congress disagreed may be inferred from the absence of any remotely similar language regarding ownership limits in Section 11.

urge the Commission to adhere to its decision to count cable systems in competitive markets toward the ownership limits.

Local Competition is not a Reasonable Basis for Lifting the Channel Occupancy Caps.

Bell Atlantic claims that if there is local competition the concern that cable operators may not carry independent programming disappears. BA Pet. at 3. We disagree. Congress has found that large MSOs have the incentive and ability to disfavor non-affiliated programmers. They do this through discriminatory prices, channel positioning, and promotion, or through outright denial of access.[3] Bell Atlantic provides no evidence that the presence of local competition diminishes either the incentive or the ability of cable operators to favor affiliated programmers and disfavor independents just as Congress described. And, as the MPAA has pointed out, the presence of rival vertically integrated systems is but cold comfort to independent programmers not affiliated with either of them.[4]

Bell Atlantic also complains that channel occupancy caps will hinder competitive entry because they will require entrants to "warehouse unused capacity." BA Pet. at 3-4. We find Bell Atlantic's vision of empty warehoused channels farfetched. The assumption that new entrants will be unable to find sufficient

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[3] H. Rep. No. 628, 102d Cong., 2d Sess. 41 (1992). ("House Report")

[4] If a multichannel operator that provides 'effective competition' is itself highly vertically integrated, it may not provide a viable alternative for the independent programmer." MPAA Reply Comments at 9.

programming to fill their channels is entirely unwarranted; a plethora of new programming exists.[5] If a day should come when cable operators actually do find themselves unable to fill those channels, the Commission may then revisit its rules. We see no justification for lifting the caps in mere anticipation of such an unlikely development.

Equally fanciful is Bell Atlantic's claim that independent programmers may rely on video dialtone as a means of bypassing the MSOs. BA Pet. at 4. CME/CFA are not aware of any existing video dialtone system. In fact, it will take years and billions of dollars before video dialtone becomes operational. As Bell Atlantic's own trade association, USTA, put the matter:

> The Commission should step back and compare the number and size of video dialtone proposals before it with its existing files on cable operators. This comparison will show how small the video dialtone 'threat' is, and how irrational it would be to assume that existing cable operators have any real concern here...

USTA Reply Comments, MM Docket. No. 92-264, at 4. It is evidently apparent to USTA, as it is to us, that embryonic video dialtone service cannot threaten (i.e. compete with) cable. By the same token it also cannot offer independent programmers a viable alternative to delivery by cable operators. Video dialtone is nowhere near sufficiently developed for the Commission to base cable ownership rules on it.

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[5] See, e.g., Richard Katz, "A Plethora of New Networks: A Wealth of New Programming Ideas have been Announced, but Where Will They Go?" Cablevision, June 7, 1993, at 32; Christopher Stern, "Many Hurdles in the Path of New Cable Nets," Broadcasting and Cable, Nov. 29, 1993.

What is not apparent is whether video dialtone will ever solve the problems associated with cable market power. Video dialtone rates may be higher than programmers can afford. After all, at present payment flows in the opposite direction--from the operators to the programmers--and not the other way around. If a pay-for-carriage service sufficed to neutralize cable's monopsony power in the program acquisitions market, then leased access would remove the need for ownership limits. That Congress understood such not to be the case is clear from its inclusion of both leased access and ownership limits in the 1992 Act.

CME/CFA remain skeptical that a cable/video dialtone duopoly will ever provide the brisk and open competition the public interest requires. However, the Commission has sensibly reserved the right to adjust the rules as experience and the development of effective competition dictate. 2nd R&O ¶ 89. The emergence of video dialtone may someday warrant revisiting the ownership rules. But it makes no sense to loosen the ownership restrictions on the basis of video dialtone competition when video dialtone has yet to become a reality.

Homes Passed in Communities Where Local Competition Exists1 Should Count Toward National Subscriber Limits

Bell Atlantic claims the ability of MSOs to control programmers at the national level depends on their operators' local monopolies. We, and more importantly Congress, disagree. While the local monopolies undoubtedly enhance their market power, large MSOs enjoy substantial clout by virtue of their size alone.[6] As the House Report noted, "[a] certain subscriber level [is] needed to launch and sustain a cable programming service."[7] The biggest MSOs are able to deliver--or withhold--such subscriber levels. They use this ability to muscle out (or extract unfair conditions from) undesired competitive programming.[8] It is far from clear how sporadic local competition seriously undermines the power that flows from being able to provide ready-made subscriber levels, a power large MSOs readily exploit in the national program acquisitions market.

Bell Atlantic also asks the Commission to believe that horizontal limits will act to suppress competition by new entrants. BA Pet. at 5. In our view this is absurd. No new entrant is going to spring to life enjoying such a large share of the cable market that it need fear constraint from the 30 percent

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[6] House Report at 42.

[7] Id.

[8] Viacom describes the process as follows: "Malone's scheme to monopolize cable television begins with his empire of cable television systems. Malone-controlled defendants Tele-Communications, Inc. ("TCI") and Liberty Media Corporation ("Liberty") have amassed local cable monopolies controlling approximately one in four of all cable households in the United States...Defendants' monopoly power as cable operators, together with their expanding interests in all other aspects of the cable industry, gives them unparalleled power to dictate terms to other cable television programmers, such as Viacom. Without access to Malone's cable system, cable network programmers cannot achieve the "critical mass" of viewers needed to attract national advertising or a sufficient number of subscribers required to make the network viable. As a result of Malone's unique control over this life-line, he can--and does--extract unfair and anticompetitive terms and conditions from cable programmers, including Viacom." Amended Complaint, Viacom Intern. Inc. v. TCI Inc., 93 Civ. 6658 (KC) S.D.N.Y. United States District Court, 1994.

ceiling the Commission has established. Bell Atlantic's vision of ownership limits which allow a new entrant to grow to almost a third of the market nevertheless discouraging entrance simply has no foundation in reality.

This much we know: local competition between video providers big enough to be constrained by the horizontal limit is at present nonexistent. Even the second largest cable company (Time-Warner) could double its subscribership and remain below the limit.[9] Not applying the limits to cable systems in competitive markets on the basis of Bell Atlantic's premonition about the limit's future effect on new entrants would be senselessly premature.

Not applying the limits would also put the Commission in the position of treating cable operators differently than broadcasters, in contravention of Congress's intent. Both the House and the Senate Reports noted that the Commission has long imposed similar ownership limits on broadcast media.[10] The Commission limits broadcast television ownership to an attributable interest in 12 stations or 25% of TV households nationally.[11] These limits apply without regard to the multiple competitors in local broadcast markets. As is well known,

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[9] Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Notice of Proposed Rulemaking and Notice of Inquiry, 8 FCC Rcd 210, 216 (1993).

[10] House Report at 42; Senate Report at 34.

[11] 47 C.F.R §73.3555(d).

broadcast markets usually have at least half a dozen competing stations.[12] The reason for the limits--that diversification of ownership assures diversity in sources of information while fostering economic competition--is precisely the same reason Congress seeks to limit the concentration of cable ownership as well.[13] We can imagine no reason why rules that apply to

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[12] "Since 1975 the number of broadcast television stations has increased by 50 percent (from 953 to 1494)...more than half of all households receive 10 or more over-the-air television signals..." Review of the Commission's Regulations Governing Television Broadcasting, 7 FCC Rcd 4111, 4113 (1992).

[13] Compare the Commission's stated reasons for the broadcast limits...

> "[T]he stated purpose of the [rule] is 'to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue economic concentration contrary to the public interest.' Diversification of ownership, then, has been viewed as the vehicle by which to assure diversity in sources of information and foster economic competition."

Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 95 FCC 2d 360, 383 (1984).

....with Congress's reasons for imposing limits on cable:

> "This increase in concentration raises two major concerns. First, there are special concerns about the concentration of the media in the hands of a few who may control the dissemination of information. the concern is that the media gatekeepers will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both. This view was forcefully expressed at the Committee's March 29 hearing by James Hedlund, president of the Independent television Association: 'Should this development [about increased concentration] concern the Congress? Yes! Its traditional concerns with media concentration--promoting a diversity of voices and economic competition--are dramatically present in the cable industry. Separate and antagonistic ownership of the mass media has long been a goal of federal policy makers. The policy has its foundation in a First

broadcasters despite vigorous local competition should not also apply to MSOs in competitive markets.

For all the above reasons, CME/CFA urge the Commission to deny Bell Atlantic's petition and to continue to apply ownership limits to cable systems in competitive as well as monopoly local markets.

Respectfully submitted,

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> the mass media has long been a goal of federal policy makers. The policy has its foundation in a First Amendment goal of promoting a diversity of ideas and speech throughout the country. Federal policy has always been to restrain concentration when it's threatened a diversity of voices even though it did not rise to the level of an antitrust violation.'"

Senate Report at 32-33, and...

> "Both Congress and the Commission have historically recognized that diversity of information sources can only be assured by imposing limits on the ownership of media outlets that are substantially below those that traditional antitrust analysis would support."

House Report at 42.

CERTIFICATE OF SERVICE

I, Dianne Alston, hereby certify that I have this 14 day of February, 1994, mailed by first class United States mail, postage prepaid, copies of the foregoing "Opposition to Petition for Reconsideration" to the following:

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